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No. 86-72

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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R. L. PAYNE CO.,
*Petitioner,*

v.

DALE MALQUIST, *et al.*,
*Respondent,*

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**On Petition for a Writ of Certiorari to the Supreme Court of Montana**

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## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TERRY A. WALLACE
119 Mount Avenue
Missoula, Montana 59801

LAURENCE J. COHEN
1125 15th Street, N.W.
Suite 801
Washington, D.C. 20005

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

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The opinions below, the basis for invoking this Court's jurisdiction, and the constitutional and statutory provisions involved are set forth in the Petition for a Writ of Certiorari at 3-4 and Appendix A and are therefore not reprinted here as well.

## COUNTERSTATEMENT OF THE CASE

From March until August of 1980, Dale Malquist, George Boharski, and George Belt, plaintiffs below and respondents herein, were employed by an electrical contractor to do construction work at a packaging plant in

Missoula County, Montana. In August 1980, that contractor was terminated from the construction project and replaced by another contractor, defendant Howard P. Foley Company, who proceeded to subcontract certain electrical work to defendant R. L. Payne Company, petitioner herein, and to defendant City Electric.

The defendants were all signatories to a collective bargaining agreement with respondent Local 768 of the International Brotherhood of Electrical Workers ("the Union"). In accordance with that agreement, defendants requested the Union to refer electricians from the Union's hiring hall to work on the construction project. The Union referred, among others, the three plaintiffs, but defendants refused to hire them.

In September 1980, the Union met with the defendants and asked for a copy of "Foley's blacklist." In response, the Union was shown a list of individuals, including plaintiffs, who would not be hired for the construction project. No reason was given by defendants for their refusal to hire these individuals.

The Union filed an unfair labor practice charge with the National Labor Relations Board against general contractor Foley, alleging that Foley's actions were discriminatorily motivated in violation of § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) ("NLRA" or "the Act"). By letter dated November 25, 1980, the Regional Director of the Board, following an investigation, informed the Union that he would not issue a complaint because his investigation "revealed no evidence" to support the charge of anti-union animus.[1]

On February 5, 1982, plaintiffs filed the instant lawsuit in Montana state court against Foley and the two subcontractors, City Electric and petitioner Payne. The complaint alleged, in pertinent part, that Foley had

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[1] The Regional Director's letter is reprinted as an appendix to this Brief.

> wilfully and maliciously blacklisted plaintiffs with itself and the other defendants named herein by telephoning, circulating a written list or otherwise transmitting the names of the plaintiffs among themselves for the sole purpose of ensuring that the plaintiffs would not be employed in their trade and skill as electricians in this area. [Pet. App. E-4]

The complaint further alleged that "the defendants conspired to and blacklisted these plaintiffs by advising among themselves and others not to hire plaintiffs, and transmitting false and misleading information as to the reasons that plaintiffs were not retained for employment," and that as a result of defendants' actions, plaintiffs were "prevented from obtaining any employment for long periods of time in the Missoula area." *Id.* E-4 to E-5. Plaintiffs sought compensation for their lost wages and for the "anguish, humiliation and mental suffering [caused by] the prolonged unemployment"; plaintiffs also sought punitive damages pursuant to the Montana anti-blacklisting law, § 39-2-803, which provides that any person who:

> does blacklist any discharged employee or attempts by word or writing or any other means to prevent any discharged employee or any employee who may have voluntarily left the company's service from obtaining employment with another person . . . is liable in punitive damages to such employee so prevented from obtaining employment, to be recovered by him in a civil action.[2]

Petitioner moved for summary judgment, principally on the ground that, as a matter of state law, plaintiffs'

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[2] The prohibition quoted in text is subject to the following statutory qualification, stated in § 39-2-802, MCA, and incorporated by reference in the anti-blacklisting section quoted in text:

> No person is prohibited from informing by word or writing any person to whom such discharged person or employee has applied for employment a truthful statement of the reasons for such discharge.

complaint failed to state a valid claim for relief under the Montana anti-blacklisting law or under Montana tort law. In addition to raising state-law issues, petitioner's summary judgment motion briefly asserted that plaintiffs' complaint was preempted by the NLRA. *See* Pet. App. D-26 to D-27. On September 12, 1984, the Montana District Court for the Fourth Judicial District granted petitioner's motion, ruling that plaintiffs' complaint is preempted by the federal labor law. Pet. App. C.

Plaintiffs appealed to the Montana Supreme Court which on February 13, 1986, reversed the trial court's decision and remanded the case for trial. The Montana Supreme Court concluded that under Montana law, "blacklisting itself constitutes tortious conduct giving rise to a civil remedy." Pet. App. B-18. And that court held that "[t]he conduct complained of is . . . not subject to NLRA proscription," and therefore "federal preemption does not exist," *id.* B-18, since "[n]o one in this litigation contends that plaintiffs were blacklisted for labor-related activities," *id.* B-13, and since "[b]lacklisting *for any purpose* is unlawful in Montana," *id.* B-12 (emphasis added).

## ARGUMENT

As this Court observed in *Longshoremen v. Davis*, —— U.S. ——, 54 L.W. 4512, 4513, 4515 (May 27, 1986), the rules for determining when a state-law cause of action is preempted by the National Labor Relations Act are by "now well-established" and have been "reiterated many times" and "applied in a multitude of cases" in the more than twenty-five years since *San Diego Unions v. Garmon*, 359 U.S. 236 (1959), was decided.

This case involves nothing more than the application of these settled principles to a particular factual context. Petitioner has not identified a single other case that has arisen since *Garmon* involving the specific state-law cause of action at issue in this case. Thus, this case does

not present the kind of important, recurring unsettled questions of law this Court sits to hear.

Nor is the issuance of a writ of certiorari justified on the theory that the court below deviated from this Court's teachings. To the contrary, as we show below, the holding of the Montana Supreme Court that the Montana tort of blacklisting is not preempted either in general or in this case accords with the principles stated in *Garmon* and is compelled by several recent decisions of this Court.

A. The starting point for analysis is the recognition that in enacting the NLRA, Congress did not "intend[] to disturb the myriad state laws . . . that set minimum labor conditions but [are] unrelated in any way to the processes of bargaining or self-organization." *Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, 53 L.W. 4146, 4625 (June 3, 1985). Rather, as this Court has concluded:

> Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety . . . "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." . . .
>
> Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act . . . When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act. [*Id.*]

The Montana anti-blacklisting law, from which the Montana Supreme Court implied a cause of action in tort,

is plainly a law enacted by the State "to protect workers within the State" by establishing "a minimal employment standard." *Metropolitan Life, supra.* That law reflects the Montana legislature's judgment that employees who are discharged or who voluntarily leave their employment should be afforded certain legal protections from attempts by former employers to prevent such employees from obtaining other employment. That legislative judgment is surely "not inconsistent with the general legislative goals of the NLRA," *Metropolitan Life, supra*; affording employees protection from blacklisting in no way retards the attempts of the NLRA to redress the "inequality of bargaining power [and] the resultant depressed wage rates" that Congress found to exist where employees are prevented from organizing and engaging in collective action, *id.* at 4624. Thus, *Metropolitan Life* permits the states to enact and enforce a law like the Montana anti-blacklisting statute.

B. Although as the Montana Supreme Court observed, "[n]o one in this litigation contends that plaintiffs were blacklisted for labor-related activities," Pet. App. E-13, petitioner nonetheless attempts to transform this case into one in which the blacklisting arguably violated § 8(a)(3), and on that basis petitioner contends that the decision below upholding state jurisdiction here is inconsistent with *Garmon* and worthy of this Court's review. As we proceed to show, petitioner's argument flies in the face of this Court's decisions in two separate and independent respects.

1. *Garmon* states the general rule that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board . . ." 359 U.S. at 245. This Court's cases "indicate, however, that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the state's interest is one that does

not threaten undue interference with the federal regulatory scheme." *Farmer v. Carpenters*, 430 U.S. 290, 302 (1977). Thus,

> "the decision to preempt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies" of permitting the state court to proceed. [*Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 189 (1978)]

*Sears* illustrates the type of "careful consideration of . . . the various interests affected," *id.* at 188, that is required to decide whether a state-law claim is preempted. That case arose out of union picketing to protest the employer's use of nonunion labor to perform certain construction work for the employer. The employer sought an injunction against the picketing in state court on the ground that the situs of the picketing invaded the employer's (state-law) property rights and thus was tresspatory. The question posed was whether Sears' trespass claim was preempted by the NLRA.

This Court answered that question in the negative, ruling that the state courts were free to entertain the employer's claim. In reaching this conclusion the Court accepted as a "premise . . . that the picketing was . . . arguably prohibited . . . by federal law." *Id.* at 187.[3] That was true, the Court explained because

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[3] The Court in *Sears* also assumed that the picketing was "arguably protected by federal law," 436 U.S. at 187, and in a separate portion of its opinion, the Court declined to "preempt[] state jurisdiction over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so." *Id.* at 202-03.

This portion of *Sears* is not relevant here because blacklisting is not, on any theory, arguably protected by the NLRA. Section 8(c) of the NLRA, 29 U.S.C. § 158(c), on which petitioner relies, provides merely that "[t]he expressing of any views, argument or

> [i]f an object of the picketing was to force Sears into assigning the carpentry work away from its employees to Union members dispatched from the hiring hall, the picketing may have been prohibited by § 8(b)(4)(D). Alternatively, if an object of the picketing was to coerce Sears into signing a prehire or members-only type agreement with the Union, the picketing was at least arguably subject to the prohibition on recognitional picketing contained in § 8(b)(7)(C). [*Id.* at 185-86]

Even though the union's picketing was arguably prohibited by the NLRA, the *Sears* Court nonetheless concluded that "[t]he reasons why preemption of state jurisdiction is normally appropriate when union activity is arguably prohibited by federal law plainly do not apply to this situation." *Id.* at 198:

> In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court. If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work-reassignment objective . . . Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. [*Id.*]

That being so, the Court drew the following conclusion:

> Accordingly, permitting the state court to adjudicate Sears' trespass claim would create *no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices.* [*Id.*; emphasis added].

*See also Belknap v. Hale*, 463 U.S. 491, 510 (1983).

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opinion . . . shall not constitute or be evidence of any unfair labor practice"; that section does *not* extend affirmative protection to such expressions so as to oust state-court jurisdiction over tort claims which turn on expressions by employers or unions. *See, e.g., Linn v. Plant Guard Workers*, 387 U.S. 53 (1966); *Belknap v. Hale*, 463 U.S. 491 (1983)).

The instant case is analytically indistinguishable from *Sears*. None of the interests safeguarded by § 8 of the NLRA is implicated by an anti-blacklisting prohibition unless the employer selects employees for blacklisting *on a basis proscribed by the NLRA;* thus here, as in *Sears*, the employers' "purposes [would] be of critical importance" to any unfair labor practice charge.[4] But as the Montana Supreme Court repeatedly stressed:

> The conduct proscribed by the state statute is "blacklisting" *per se*. There is no requirement that blacklisting be related to an unfair labor practice. *If an employer blacklists an employee for any reasons, that employer is subject to liability under § 39-2-803, MCA.* [Pet. App. B-11; emphasis added.] [5]

Thus, just as the union's objective in *Sears* in conducting the picketing was "irrelevant to the state claim," so, too, under Montana law, the issue of the employer's motivation is entirely irrelevant to the tort of blacklisting. Proof of an anti-union motive would not be part of the plaintiffs' case nor would such proof provide the employer with a defense. Accordingly, here, as in *Sears*, "permitting the state court to adjudicate [plaintiffs' blacklisting] claim would create no realistic risk of interference with the Labor Board's primary jurisdiction." And the fact that the NLRA may provide a remedy for blacklisting motivated by anti-union animus cannot suffice to oust state jurisdiction over the tort of blacklisting as that tort is defined in Montana, any more than the existance of an NLRA remedy with respect to picketing

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[4] The cases on which petitioner relies to support the proposition that "blacklisting is recognized as an unfair labor practice," Pet. at 22-23, all involve blacklisting predicated on *anti-union animus.*

[5] *See also id.* B-12 ("Blacklisting for any purpose is unlawful in Montana"); *id.* at B-17 ("Blacklisting *per se* is proscribed in Montana").

which seeks to achieve certain objectives defeated state jurisdiction over the trespass claim in *Sears*.

2. Our showing, thus far, establishes that because the issue of motivation is irrelevant as a matter of state law to the tort of blacklisting, that tort is not preempted regardless of what may have motivated an employer to engage in blacklisting in a particular case. But even if, contrary to what we have just shown, the state courts were preempted from entertaining a blacklisting claim in circumstances in which the employer's conduct was arguably motivated by anti-union animus, the Montana Supreme Court's decision sustaining state-court jurisdiction in the instant case still would not raise a question worthy of this Court's attention. For as the Montana Court observed, "No one in this litigation contends that plaintiffs were blacklisted for labor-related activities." Pet. App. B-13. And under this Court's decision last Term in *Longshoremen v. Davis*, *supra*, petitioner's speculation that the blacklisting may have violated § 8(a)(3) would not suffice to justify a preemption ruling here, even assuming *arguendo* that a blacklisting claim could be preempted based on the circumstances of a particular case.

*Davis* was a misrepresentation case in which the plaintiff claimed that he had been advised by the defendant-union that he could not be lawfully discharged for engaging in union activity; that advice was false if, as he contended, plaintiff was a "supervisor" within the meaning of the NLRA. The Court recognized that, under *Garmon*, if (as the union claimed) the plaintiff "was arguably an employee, rather than a supervisor," the issue of the plaintiff's legal status "was to be initially decided by the NLRB, not the state court." 54 L.W. at 4516. But the Court nonetheless held that the plaintiff's claim was not preempted because the Union failed to "carry the burden of showing at least an arguable case." *Id.* at 4517. The Court explained:

> The precondition for preemption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim, without more, that [plaintiff] was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board. *The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.* [*Id.* at 4516; emphasis added]

Similarly, in this case, petitioner has failed to "put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act." *Davis*, 54 L.W. at 5417. Petitioner did not present any evidence below, and has not offered any evidence here, to suggest an arguable case of anti-union motivation. Indeed, petitioner has steadfastly denied the existence of any such evidence. And the Regional Director of the NLRB found "no evidence" of anti-union motivation in his investigation. P. 2 *supra*. Thus, even if state-court jurisdiction over the tort of blacklisting could be defeated by evidence of an anti-union motivation for the blacklisting—evidence that would be of no legal relevance to the tort claim—petitioner still "has not met its burden of showing that the conduct here was arguably subject to the Act." *Id.*

C. One final point needs to be made. If, in the trial of a particular blacklisting claim, a plaintiff were to attempt to use evidence of the plaintiff's union activities and of the employer's anti-union animus to lend credence to the plaintiff's claim that the employer had, in fact, blacklisted the plaintiff, there would be a substantial risk

that the fact-finder would invade the province of the NLRB in deciding the state-law issue. For that reason, we believe this Court's admonition in *Farmer* is fully applicable to blacklisting cases as well: "In view of the potential for interference with the federal scheme of regulation, the trial court should be sensitive to the need to minimize the jury's exposure to evidence of employment discrimination in cases of this sort." 430 U.S. at 305 n.13.

Unlike *Farmer*, however—which came to this Court following a full trial in state-court—the instant case is presently in an *interlocutory* posture. Consequently, the only issue raised here is whether the plaintiff's complaint, *on its face*, states a claim within the jurisdiction of the state courts. And, as shown above, *Metropolitan Life*, *Sears*, and *Davis* each independently compels the conclusion that the Montana Supreme Court answered that question correctly in upholding state-court jurisdiction over plaintiffs' tort claim.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

TERRY A. WALLACE
119 Mount Avenue
Missoula, Montana 59801

LAURENCE J. COHEN
1125 15th Street, N.W.
Suite 801
Washington, D.C. 20005

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

# APPENDIX

## APPENDIX

[SEAL]

NATIONAL LABOR RELATIONS BOARD
REGION 19
29th Floor, Federal Building, 915 Second Avenue
Seattle, Washington 98174

November 25, 1980

Telephone (206) 442-4532

Reg McMurdo, Business Manager
International Brotherhood of
Electrical Workers, Local 768
208 East Main
Missoula, MT 59801

Re: H. P. Foley Company
Case No. 19-CA-12861

Dear Mr. McMurdo:

The above-captioned case (x), charging violations under Section 8 of the National Labor Relations Act, as amended, has (xxxx) been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter. A written summary report of the basis for my conclusions is attached.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. 20570 and a copy with me. This appeal

must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on December 8, 1980. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with me within the time stated above.

Very truly yours,

CHARLES M. HENDERSON
Regional Director

Enclosures

Certified Mail No. 909895
Return receipt requested

cc: General Counsel, Attention: Office of Appeals, National Labor Relations Board, 1717 Pennsylvania Ave. N.W., Washington, D.C. 20570

Ronald F. Sysak, Attorney, Third Floor Mony Plaza, 424 East 5th South, Salt Lake City, UT 84111

H. P. Foley Company, Champion International Expansion Project, Frenchtown, MT 59834

Case No. 19-CA-12861 November 25, 1980

SUMMARY REPORT

The investigation revealed no evidence to show that H. P. Foley, the Employer, refused to hire Dale Malquist because of his activity as a union steward while employed at the construction site by another firm which was performing electrical contracting work before the Employer took over the job.